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Brief of Kirlin for Appellee

Filed Nov. 11, 1895.

Supreme Court of the United States,

NO. 790. OCTOBER TERM, 1895.

THE FRANKLIN SUGAR REFINING COMPANY,
Libelant, Appellant,

vs.

THE STEAMSHIP "SILVIA," RED CROSS LINE,
Claimant, Appellee.

BRIEF FOR "SILVIA" IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONVERSE & KIRLIN,
Proctors for "Silvia."

J. PARKER KIRLIN,
Advocate.

In the

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Statement.

The *Silvia* is an iron steamship, classed 100 A1 at Lloyds, and a first-class vessel in every respect (Record, fol. 34). She was maintained in first-class navigable condition, and was not wanting in seaworthiness in any known regard (fol. 65). She was officered by a master of 16 years' experience (fol. 34), and a chief officer who also apparently holds a master's certificate, since he had pre-

viously been in command of the same vessel (fol. 152). On a voyage from Cuba to New York, libelant's cargo was damaged by water entering the forward 'tween-decks, which was fitted up as a steerage (but in which no passengers were carried on the voyage in question), the water passing thence down into the lower hold, where the damage occurred. The glass port which broke during the voyage was one of a series set in the side of the ship, to afford light to the steerage. As the vessel was laden, this port was 11 feet above the water line (fol. 101). It consisted of a round glass plate five-eighths of an inch thick, and about 8 inches across, set in a brass frame, which, in turn, fitted tightly into a hole made in the plating of the ship, and was opened and shut on a hinge fastened to the side of the port (fols. 44-46). The port had been properly and securely fastened before the vessel sailed, and was sound and in good condition (fol. 125). An iron blind, working upon a hinge at the top, was provided to close over the glass port, as and when required. This blind, as well as the others, provided for the other ports in the steerage, was left open on the voyage in question, the glass being thought, from previous experience, sufficient to withstand the mere action of sea water against the side of the ship eleven feet above the water line. If the iron blind had been closed, as it might have been, it would have prevented the entrance of any water when the glass port became broken (fols. 45, 46, 51, 53, 54, 79, 80).

The vessel had been employed in trading between New York and Halifax, and irregularly to Cuba, for some years, with a series of similar ports extending from the stem to the stern of the ship, none of which, in the most severe weather, had ever before been broken. This was one of two additional ports made in London three months before this voyage, and in the interim it had made several voyages in safety (fol. 104).

According to the claimant's evidence, it is not the practice, either in this ship or in others, to close the iron blind over a 'tween-deck port as far above the water line as this, except when cargo is on the inside and there is danger of the glass being broken by a blow from within, the construction of the ports being such that they are assumed and found to be of sufficient strength to resist the ordinary action of the sea (fols. 46–50, 118–121, 130, 181–182).

A further reason for leaving the dummy open in the steerage on this voyage was that some of the stores, oil, spare gear, &c., were in there (fol. 76), and were liable to be wanted at any time on the voyage. Counsel for libelant asked the master whether there was any special reason for leaving the dummy open on this occasion, and he said that there was.

"Q. No particular reason for leaving it open, was there? A. Yes. We wanted to go down there at any time for stores, oil, lights and so on" (fol. 79).

Access to the steerage was through the No. 1 hatch. After the glass ports had been closed at Matanzas, the covers of this No. 1 hatch had been put on and battened down. Battening down a hatch, as the Court is aware, consists merely in spreading canvas tarpaulins on top of the hatch covers, (of which there are generally a large number divided up into small sections, used for closing the hatchways,) and wedging the edges of the canvas up against the sides of the iron hatch coaming, so as to make the hatch watertight. It is perfectly obvious that it could, at most, take only a few moments to knock out the wedges at one end, lift the tarpaulins, and take off one of the sectional hatch covers, which would be probably 2½ by 4 feet, and thus obtain access to the steerage. The Circuit Court of Appeals so found (fol. 287). It is observed that libelant's petition, with the view of presenting a plausible case for the intervention of this Court,

states (fol. 21): "*There is no evidence whatever to support this inference.* The hatches were battened down for the express purpose of preventing access to the 'tween-decks."

Attention is called to the absence of any citation from the record in support of the latter sentence. The Court will search the record in vain for anything to support it. Hatches are battened down, as the Court knows, to keep out water, not to keep out men. That there was easy and ready access to this steerage was distinctly proved by the libelant's counsel himself on the cross-examination of the master:

"Q. What was it (the steerage) used for on this occasion? A. We had some lights, a little stores, and one thing and another there.

Q. *Do you mean that there was perfectly easy access to that steerage at all times during this voyage?* A. *Yes.*

Q. *Nothing to prevent a man from seeing whether anything had happened to these ports by going down there into the steerage?* A. *Nothing in the world* to hinder him from seeing all around" (fols. 76–77).

When water was discovered entering the ship, the frame in which the glass was set was found closed and fastened; some shattered remains of the glass were still in the frame and the remainder of it lay broken in many pieces in the steerage (fols. 189, 190, 179, 180). It was the opinion of the witnesses examined in the case that the mere pressure of water could not have broken the glass, but that it must have been broken by a piece of wood afloat on the surface of the waves during the period of a storm (fols. 55, 56, 85, 129). The inference that it was so broken arises from two circumstances: (1.) The many pieces into which the glass was broken; (2.) Its great strength, arising from the fact that it was only 8 inches across and 5/8 of an inch thick, which, from its height above the water line, would make it impossible that the crest of a wave alone could break it; and, furthermore, because, in common experi-

ence, these glasses so set are found sufficient to resist both ordinary and extraordinary action of mere sea water.

There was no evidence in the case to contradict that furnished by the steamship, that the common usage, based upon experience in similar cases, was to depend entirely on the glass to prevent incursion of sea water, except where there was cargo in a compartment which would be liable to damage the port from within, and which would prevent access to the port for the purpose of closing the blind, in case any accident should occur to the glass.

POINTS.

I.

The vessel was not unseaworthy when she started on the voyage.

The above recital of facts shows that the steamer was seaworthy in all respects, and the Circuit Court of Appeals so found. The District Judge found that the vessel was not seaworthy because the blind was not closed; nevertheless, his decision was the same as that of the Circuit Court of Appeals, because he found that the omission to close it was the failure of those in charge of the vessel to use the appliances which the owners furnished, and that the closing of the blind would have prevented the loss. He further found, whether, in fact, the vessel was seaworthy or not, the owner had used due diligence to make her so within the Third Section of the Act of Congress, approved February 13, 1893 (27 Statutes at Large, 445), and that the loss resulted from a "fault or error in the management" of the ship within that section, citing in

support of his decision the case of Hedley *vs.* Pinckney Steamship Company, 1894, Ap. Cases, 222, which was precisely in point, and supported the proposition for which it was cited. The Circuit Court of Appeals, however, considered that the District Judge had laid down too strict a rule of seaworthiness, and that, as the vessel was obviously fit for the ordinary weather to be encountered on the voyage without the iron blind shut, and as there was ready access to the hold to shut it, if necessary, upon the approach of extraordinary storms, the loss should be ascribed to the negligence of those in charge of the vessel in her "management and navigation" during the voyage, and not before the voyage began.

Authority for that proposition is found in the judgments of Lord Cairns and Lord Blackburn in Steele *vs.* State Line, 3 Ap. Cases, 72, 82, and in Hedley *vs.* Pinckney Steamship Co. (*supra*). The case of *Dobell* vs. *S. S. Rossmore Co.*, 1895, 2 Q. B., 408, is not in conflict with the decision of the Circuit Court of Appeals. This case was cited to the Court there in the argument of counsel (p. 411), and it will be found on examination of the opinions that the case there turned upon the finding of fact, that the port which had been left insecurely fastened was blocked up with cargo, so that there was not ready access to the hold to secure it upon the approach of storm. Lord Esher (p. 414) said:

"Now comes the question, was the ship seaworthy when she started? There was a porthole through which water could come. If that had been all, and there had been the means of immediately closing the porthole, the matter would have been otherwise, but here there were no facilities for closing the porthole, for it could only be closed after the removal of a considerable part of the cargo; so, that if there were rough weather or a storm, the water would be coming in all the time until the porthole could be got at and closed."

The other Judges point out the difference between that case and the case of *Steele* vs. *State Line*, 3 App. Cases, 72, and distinguish them on the ground that there was not ready access to the porthole in the Dobell case; while in Steele *vs.* State Line, it was decided that the vessel would be seaworthy if there was ready access in such case. Possibly the Dobell case would have been in conflict with the decision of the District Court in this case, although it is pointed out that the Court of Appeals in the Dobell case was dealing with this act simply as a clause in a bill of lading, whereas the District Judge in this case was dealing with it as a statute, in which the word "voyage" does not occur. It is, however, unnecessary in this case to consider whether the decision of the District Judge or of the Court of Appeals in Dobell *vs.* S. S. Rossmore Co. be correct, as the Court of Appeals, on undisputed facts, found that the ship was seaworthy, and no decision of this Court in any similar case or upon similar facts held the contrary, nor is there any reason to suppose that it would render a different decision in this case.

II.

The fact that this Court has issued a writ of *certiorari* in the case of Wuppermann *v.* The *Carib Prince* is immaterial.

The case of the *Carib Prince* bears no relation to the present one, and any consideration of the Harter Act was in fact unnecessary for the decision in that case. The steam-ship there defended upon the exception in the bill of lading from latent defects, libelants' evi-

dence having disclosed that the damage arose from such cause. The counsel for the libelants in the Circuit Court of Appeals raised an argument that the insertion of any clause in the bill of lading, qualifying or assuming to qualify the implied warranty of seaworthiness, was contrary to the second clause of this statute. The Circuit Court of Appeals, therefore, considered that matter and resolved it in the negative, but as the contract thereunder consideration was made in British territory, upon a British ship, for transportation of goods from a British port to a port in the United States, and the loss occurred at sea, without the negligence of the shipowner, it is obvious that the question whether the insertion of an exception against latent defects was valid or invalid, would be determinable by Engligh law, and not by the law of this country, and, furthermore, that the first and second sections of this statute, and the fourth section, which provides a penalty, were only designed to apply to American vessels or to foreign vessels loading in American ports, and not to vessels loading abroad, trading to these ports. It will be observed that the first and second sections deal only with vessels trading between port or ports in the United States and foreign ports (meaning between ports in the United States or between a United States port and a foreign port), whereas, the language of the third section makes that applicable to vessels trading *to or from* any port or ports in the United States of America.

III.

No sufficient reason being shown for the intervention of this Court, and the questions to which the attention of the Court is asked being in the main academic, inviting rather a discussion of the Harter Act by the Court than a reversal of this judgment, the writ of *certiorari* prayed for should be refused.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for *Silvia*.

J. PARKER KIRLIN,
Advocate.

NEW YORK, November 8, 1895.